

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

ARIF K. MUSAYEV,

Petitioner,

v.

GARY FLEMING,

Respondent.

CASE NO. C04-1281L

REPORT AND  
RECOMMENDATION

I. INTRODUCTION AND SUMMARY OF CONCLUSION

Petitioner is proceeding *pro se* in this 28 U.S.C. § 2254 habeas corpus challenge to his judgment and sentence. He contends that his judgment and sentence are invalid because his due process rights were violated. The alleged due process violations suffered by petitioner include 1) not being read his Miranda rights at the time of his arrest, 2) being denied access to an interpreter at the time of his arrest, 3) not being appointed an attorney until five weeks after his arrest, 4) being held in custody for sixteen months without investigation, 5) waiving his right to a speedy trial against his will, 6) the introduction of improper expert witness testimony at trial, 7) ineffective assistance of counsel, 8) having a biased jury, 9) juror misconduct, and 10) prosecutorial misconduct. Additionally, petitioner contends that he was denied his right to the assistance of his consulate, which is a right guaranteed to him by treaty. Respondent filed an answer

1 requesting that the court deny the petition on the ground that it is barred by the statute of  
2 limitations as set out in 28 U.S.C. § 2244(d)(1). Having reviewed the record in its  
3 entirety, I recommend that petitioner's § 2254 habeas petition be dismissed as untimely  
4 pursuant to 28 U.S.C. § 2244(d)(1).

## 5 II. PROCEDURAL HISTORY

6 On December 8, 2000, petitioner was convicted of attempted second degree  
7 murder and was sentenced to 116.25 months in jail. (Dkt. #9, Amended Petition, p. 1).  
8 Petitioner appealed to the Washington Court of Appeals. (Amended Petition, p. 2). In  
9 January 2002, the Court of Appeals affirmed the conviction. *Id.* Petitioner sought further  
10 review by the Washington Supreme Court. *Id.* The Washington Supreme Court denied  
11 review on October 8, 2002. *Id.* The state Court of Appeals issued its mandate on  
12 February 28, 2003. (Dkt. #13, Answer, p. 2). The United States Supreme Court denied  
13 petitioner writ of certiorari on March 10, 2003. *Id.*

14 Petitioner filed the current federal habeas petition, at the earliest, on May 24,  
15 2004, the date he first signed the petition.<sup>1</sup> (Dkt. #1). Petitioner filed his amended  
16 petition on July 27, 2004. (Dkt. #9). On September 27, 2004, respondent filed an answer  
17 contending that the one-year statute of limitations has expired, thus making this petition  
18 time-barred. (Dkt. #13). On October 10, 2004, petitioner filed a reply wherein he  
19 contends that the statute of limitations should be equitably tolled because, during the one-  
20 year statute of limitations time period, petitioner was recovering from a stroke that  
21 affected his cognitive abilities. (Dkt. #15). In support of his claim for equitable tolling,

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24 <sup>1</sup>Federal and state habeas petitions are deemed filed when the pro se petitioner prisoner  
25 delivers them to prison authorities for forwarding to the Clerk of the Court. See Saffold v.  
26 Newland, 250 F.3d 1262, 1268 (9th Cir. 2001), *vacated and remanded on other grounds*, 122 S.  
Ct. 2134 (2002).

1 petitioner provided the affidavit of Robert Miller who declares that he has knowledge of  
2 petitioner's stroke and has observed the stroke's detrimental effects on petitioner's  
3 cognitive abilities. *Id.* Respondent filed a response to petitioner's reply challenging the  
4 sufficiency of evidence in support of petitioner's claim of entitlement to equitable tolling.  
5 (Dkt. #17). Respondent requests that the Court strike Robert Miller's affidavit because it  
6 contains expert testimony, which Mr. Miller is not qualified to render. *Id.*

7       On November 12, 2004, the Court issued an order directing the expansion of the  
8 record, which required petitioner to submit medical evidence to support his claim of  
9 having suffered a stroke that affected his cognitive abilities. (Dkt. #18). Petitioner  
10 responded with a motion to compel requesting that the Court order respondent to produce  
11 a copy of petitioner's medical record at no cost to petitioner. (Dkt. #19). On December  
12 2, 2004, respondent responded to the motion arguing against providing a free copy of the  
13 medical record. (Dkt. #22). Petitioner filed a reply to the response on December 10,  
14 2004, and included a copy of a medical report that mentioned petitioner's stroke. (Dkt.  
15 #23). On December 28, 2004, petitioner filed a response to the Court's order to expand  
16 the record, which included medical documents that contained mention of his stroke.  
17 (Dkt. #24). On January 25, 2005, the Court entered an order striking as moot petitioner's  
18 motion to compel because he was able to provide to the Court, through his own efforts  
19 and through the cooperation of respondent, the relevant medical documents. (Dkt. #25).

20       The Court has considered all the medical documents submitted by petitioner in  
21 making its recommendation.

### 22                                   III. DISCUSSION

23       The Antiterrorism and Effective Death Penalty Act of 1996 ( the "AEDPA")  
24 imposes a one-year statute of limitations on habeas corpus petitions filed by state  
25 prisoners in federal court. 28 U.S.C. § 2244(d)(1). A petition must be filed within one

1 year from the date that the state court judgment became final (either by the conclusion of  
2 direct review or the expiration of the time for seeking such review). Id. at § (d)(1)(A). In  
3 the present case, petitioner's state court judgment became final on March 10, 2003, the  
4 date the United States Supreme Court denied the petition for a writ of certiorari. (Dkt.  
5 ##9, 13). Consequently, petitioner's time period for filing his habeas petition expired  
6 March 9, 2004. Petitioner did not file his habeas petition until May 24, 2004.

7 On the issue of equitable tolling, which is permitted under Calderon v. United  
8 States Dist. Ct. (Beeler), 128 F.3d 1283, 1288 (9th Cir. 1997), *overruled in part on other*  
9 *grounds by Calderon v. United States Dist. Ct. (Kelly)*, 163 F.3d 530, 540 (9th Cir. 1998)  
10 (en banc), the Ninth Circuit has made clear that "[e]quitable tolling will not be available  
11 in most cases, as extensions of time will only be granted if 'extraordinary circumstances'  
12 beyond a prisoner's control make it *impossible* to file a petition on time." Calderon, 128  
13 F.3d at 1288 (citing Alvarez-Machain v. United States, 107 F.3d 696, 701 (9th Cir.  
14 1997)). (Emphasis added). The Ninth Circuit further explained in Miles v. Prunty, 187  
15 F.3d 1104, 1107 (9th Cir. 1999), that "[w]hen external forces, rather than a petitioner's  
16 lack of diligence, account for the failure to file a timely claim, equitable tolling of the  
17 statute of limitations may be appropriate."

18 Petitioner argues that he is entitled to equitable tolling because, during the statute  
19 of limitations period, he suffered a stroke that affected his cognitive abilities. In support  
20 of his argument, petitioner offers medical documentation and the affidavit of Robert  
21 Miller. In his affidavit, Robert Miller states that petitioner's stroke affected petitioner's  
22 cognitive abilities, thus rendering him unable to file his habeas petition within the statute  
23 of limitations time period. In response, respondent argues that Robert Miller's affidavit  
24 should be stricken because he is not an expert and is therefore not qualified to render an  
25 opinion regarding the stroke's effects on petitioner's cognitive abilities. We need not

1 address the admissibility of Robert Miller's affidavit because the medical documents  
2 provided are sufficient to help assess whether petitioner would have been able to file his  
3 habeas petition within the statute of limitations period.

4 The medical documents clearly indicate that petitioner suffered a stroke in March  
5 2002 or before. (Dkt. ##23, 24). The record reveals that during that time period, and in  
6 spite of the alleged cognitive deficits, petitioner was able to litigate his state court appeal  
7 and bring a petition for writ of certiorari. Specifically, his appeal to the Washington  
8 Court of Appeals was denied in January 2002 and his appeal to the Washington Supreme  
9 Court was denied in October 2002. Subsequently, he petitioned for a writ of certiorari to  
10 the United States Supreme Court, which was denied on March 10, 2003. Because  
11 petitioner had sufficient cognition to bring these appeals, this Court finds that petitioner's  
12 stroke and its effect on his cognitive abilities did not make it *impossible* for him to file his  
13 petition on time. Therefore, equitable tolling is not available to him in this case.

14 IV. CONCLUSION

15 For the reasons stated above, I recommend that the petitioner's federal habeas  
16 petition be DENIED and that this action be dismissed with prejudice. A proposed order  
17 accompanies this Report and Recommendation.

18 DATED this 19 day of April, 2005.

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21 MONICA J. BENTON  
22 United States Magistrate Judge  
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